BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	No. 03-1960
HEATH MCWHORTER, Bar No. 021224	)	**DISCIPLINARY COMMISSION REPORT**
RESPONDENT.	)	

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on May 19, 2007, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Amended Hearing Officer's Report filed March 5, 2007, recommending acceptance of the Tender of Admissions and the Agreement for Discipline by Consent (Tender) and the Joint Memorandum (Joint Memorandum) in Support of Agreement for Discipline by Consent providing for a 30-day suspension and costs.

Decision

The eight members[1] of the Disciplinary Commission by a majority of six[2] recommend accepting and adopting the Hearing Officer's findings of fact, conclusions of law, and recommendation for a 30-day suspension[3] and costs of these disciplinary proceedings.[4]

Based on the factual uniqueness of this matter and mitigating circumstances including Respondent's inexperience in the practice of law, and because of possible

[1] Commissioner Horsley did not participate in these proceedings.
[2] Commissioners Baran and Todd were opposed. *See* dissenting opinion below.
[3] In the case law offered for a proportionality analysis, the sanction ranged from censure to a lengthy suspension. *See* Hearing Officer's Report, pp. 15-17.
[4] A copy of the Hearing Officer's Report is attached as Exhibit A.

evidentiary concerns, the Commission affirms the recommended sanction. The Commission however, requests that this matter not be cited in future proportionality analysis unless the matter is *directly* on point.

RESPECTFULLY SUBMITTED this 2nd day of June, 2007.

J. Conrad Baran, Chair
Disciplinary Commission

Commissioners Baran and Todd respectfully dissenting:

Because of the serious nature of the alleged violation, we would reject the tender offer and remand this matter for a hearing. We do not believe it is in the interest of the public or the Bar to accept a compromise on this type of alleged violation. The State Bar has accused Respondent McWhorter of violating ER 3.3(a)(3) that provides a "lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false." Subpart (a)(3) also provides that "[i]f a lawyer, the lawyer's client or a witness called by the lawyer has offered *material* evidence and the lawyer *comes to know of its falsity*, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." (emphasis added.) The compromise appears to focus solely on this second portion of ER 3.3(a)(3). The Complaint, however, appears to allege a violation of the first part—knowingly offering false evidence. In my view, this is an extremely serious charge.

The Complaint alleges that when McWhorter's employer, Melvin Sternberg examined Mr. Monte Pollard in a dissolution proceeding concerning distribution of property, Mr. Pollard, when asked if his wife was now pregnant, answered he would not know, but maybe Sternberg's junior aid (referring to McWhorter) might know that. (Tr.

2/25/03, at 45-47.) Sternberg pursued the line of questioning and Mr. Pollard testified that his wife told him that she had oral sex with McWhorter. (*Id.*)

This exchange occurred on February 25, 2003. *About a week later*, on March 4, 2003, McWhorter examined the wife, Mrs. Suzanne Pollard. In his examination, he asked Mrs. Pollard the following questions and obtained the following answers.

> Q. You heard Monte testify that you had oral sex with me. *Is that a fabrication*?
> A. Yes
> . . . .
> Q. *Have you had sex with me*?
> A. No.

(Tr. 3/3/03, at 59-60.) (emphasis added). The record strongly suggests McWhorter knew these answers were false at the time he asked the leading and suggestive questions. If there is clear and convincing evidence that he did, then he knowingly presented false evidence. Presentation of false evidence is a felony offense. *See* A.R.S. section 13-2703 (accomplice). If the testimony is material—and in my view, there are many reasons to believe it is—then they engaged in perjury, a class 4 felony involving moral turpitude.

The fact that at the time McWhorter was a new lawyer does not excuse such conduct. Knowing presentation of false testimony strikes at the very heart of the justice system. The prohibition against offering false evidence is such a basic ethical concept that to offer false evidence is simply inexcusable—regardless whether the attorney is inexperienced and regardless whether the testimony or evidence is material.

Original filed with the Disciplinary Clerk
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Copy of the foregoing mailed
this 22nd day of June, 2007, to:

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/mps